

SERVICE DATE – APRIL 30, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a)—CANADIAN NATIONAL RAILWAY COMPANY

Decided: April 29, 2015

On July 30, 2013, the National Railroad Passenger Corporation (Amtrak) filed an application under 49 U.S.C. § 24308(a)(2) seeking: (1) the institution of a proceeding and a procedural schedule to determine reasonable terms and compensation for Amtrak's use of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, Canadian National Railway Company (CN)) facilities (including rail lines) and services, making those new terms and compensation retroactively effective as of August 12, 2013;¹ and (2) an interim service order, effective August 12, 2013, requiring CN to continue to make available to Amtrak the facilities and services necessary for Amtrak to continue to operate on CN rail lines under the same terms and compensation as the current Amtrak-CN contract.²

In a decision served on August 9, 2013, the Board instituted a proceeding to establish reasonable terms and compensation for Amtrak's use of CN's facilities and services. Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., slip op. at 3 (STB served Aug. 9, 2013). The Board also adopted CN's offer (made in its August 1, 2013 letter) to continue providing facilities and services to Amtrak on an interim basis under the terms of the existing contract. *Id.* Subsequently, the Board adopted the procedural schedule proposed by Amtrak and CN and granted the parties' joint motion for a protective order. The Board also granted several extensions of the procedural schedule to facilitate the parties' discovery process. In addition, the Board issued decisions addressing discovery disputes on April 15, 2014, and September 23, 2014. In the September 23 decision, the Board modified the procedural schedule by ordering Amtrak to file a notice with the Board when production to CN is complete and stating that opening submissions would be due 30 days from the completion of discovery. Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., slip op. at 11-12 (STB served Sept. 23, 2014).

¹ The agreement between Amtrak and CN that governed terms and compensation expired on August 11, 2013, and Amtrak therefore requested that the Board's orders be retroactively effective as of August 12, 2013. *See* Application at 1-2.

² CN responded to Amtrak's application by letter on August 1, 2013, and by formal reply on August 19, 2013.

On December 2, 2014, CN filed its third motion to compel responses to discovery requests. Amtrak replied on December 10, 2014, that it was “willing to produce substantially all of the additional information CN has requested as narrowed by the language of the Third Motion to Compel”³ and that it was prepared to provide the discovery responses no later than December 23, 2014.⁴

In a February 3, 2015 decision, the Board ordered the parties to inform the Board by February 10, 2015, of the extent to which discovery regarding the issues raised in CN’s third motion to compel had progressed since Amtrak’s December 10 reply, and ordered CN to indicate how, in light of any such progress, CN requests that the Board proceed with the pending motion. In its update, Amtrak claims that it produced ridership and revenue data for the Amtrak passenger services that run on CN’s lines for the relevant time period, but that it withheld three data fields that would disclose pricing and ticket-specific revenue. CN claims in its update that Amtrak failed to produce sufficient revenue information. CN therefore requests that the Board grant the third motion to compel with respect to revenue information and dismiss the third motion as to ridership information.

On March 16, 2015, CN filed a fourth motion to compel responses to discovery requests, in which CN asks that the Board order Amtrak to produce five additional items or sets of items and claims that discovery should not be considered complete until Amtrak has produced the items. Amtrak replied to the fourth motion to compel on March 23, 2015. On March 25, 2015, CN filed a letter⁵ in which CN states that Amtrak had provided some of the items that CN sought in the fourth motion to compel, and that CN therefore withdraws the fourth motion to compel as to the Policy & Procedures Manual referenced in ATK0000126036, the Delay Analysis Reports, and the Delay Between Stations Reports. CN states that its fourth motion to compel was not resolved regarding the Host Railroad Issue Log and the Quarterly Dockets and makes further argument regarding those items.

DISCUSSION

Under 49 U.S.C. § 24308(a), Amtrak may contract with a railroad to use the railroad’s facilities and have the railroad provide services under terms on which Amtrak and the railroad agree. 49 U.S.C. § 24308(a)(1). If the parties cannot agree (and if the Board finds it necessary to carry out U.S. Code Title 49, Subtitle V, Part C), the Board shall order that the facilities be made available and the services provided to Amtrak and prescribe reasonable terms and compensation for the facilities and services. 49 U.S.C. § 24308(a)(2)(A).

In its motions to compel, CN argues that the data and items it seeks are relevant to issues such as appropriate levels for incentives and penalties and their structure, on-time performance,

³ Amtrak Reply to Third Motion to Compel 7.

⁴ Id. at 8.

⁵ CN sought leave to make the filing. The Board will accept the filing in the interest of compiling a more complete record.

and scheduling. In reply, Amtrak argues that Amtrak has already produced sufficient information, that the materials sought by CN are highly confidential and not relevant to the issues in this proceeding, and that a search for the materials would unreasonably burden Amtrak.

The Board has signed a Memorandum of Understanding (MOU) with the Federal Energy Regulatory Commission (FERC) to employ the services of FERC administrative law judges (ALJs) on a case-by-case basis to perform discrete, STB-assigned functions such as adjudicating discovery disputes between parties in cases pending before the STB.

The Board assigns and authorizes Administrative Law Judge John P. Dring to entertain and rule upon discovery matters and to resolve all disputes concerning discovery in this proceeding. The parties in this proceeding are hereby directed to send copies of all their filings and documents in this proceeding to Judge Dring at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is assigned to Administrative Law Judge John P. Dring for handling of all discovery matters and initial resolution of all discovery disputes.
2. Each party in this proceeding must send a copy of its filings to Judge Dring at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426.
3. Judge Dring will be added to the service list in this proceeding and a copy of this decision will be served upon him.
4. A copy of this decision will be served on the United States Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Room 2458, Washington, DC 20414-9400. Judge Dring shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.
5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.